**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 652 of 2007**

**For Approval and Signature:**

# HONOURABLE MR.JUSTICE C.K.BUCH

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? | |
| 5 | Whether it is to be circulated to the civil judge ? | |

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**SUNIL JETHUBHA MAKWANA - Appellant(s)**
**Versus**
**THE STATE OF GUJARAT - Opponent(s)**

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**Appearance :**
MR VAIBHAV SHETH WITH MR GIRISH D BHATT for Appellant(s) : 1,
MR PD BHATE, LD.APP for Respondent (s) : 1,

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## CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

**Date : 18/09/2007**

**ORAL JUDGMENT**

1. Heard Shri Vaibhav Sheth, learned counsel appearing on behalf of Shri G.D. Bhatt for the appellant and Shri P.D. Bhate, learned Additional Public Prosecutor, appearing on behalf of the respondent-State.

2. The appellant-orig.convict (hereinafter

referred to as 'the appellant') has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated dated 15th March 2007 passed by the learned Presiding Officer, Fast Track Court, Porbandar, in Sessions Case No.10 of 2003, whereby the learned trial Judge has held the appellant guilty for the charge of offence punishable under Section 363 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 03 (three) years and a fine of Rs.3000/-, and in default of making payment fine, the appellant is ordered to undergo simple imprisonment for 03 (three) months. However, the learned trial Judge has acquitted the appellant from the charge offences punishable under Sections 366 and 376 of the Indian Penal Code, mainly keeping in mind the deposition of the victim girl and other aspects available on record, including the medical evidence led by the prosecution.

3. Shri Vaibhav Sheth, learned counsel appearing for the appellant, has taken me through the

main grounds of challenge mentioned in the memo of the appeal and so also the reasons assigned by the learned trial Judge while recording the finding of guilt of offence punishable under Section 363 of the Indian Penal Code. He has also taken me through the oral as well as documentary evidence, including the complaint dated 22nd July 2002 filed by father of minor victim girl namely Bavanbhai Parbatbhai. It is submitted that the learned trial Judge has mainly relied upon the evidence of the victim girl examined vide Ex.29 and other evidence produced as to the age of the victim girl. According to the learned trial Judge, there was a convincing evidence to show that on the date of incident i.e. 26th July 2002, the victim girl was below 18 years of age, and when it is the say of the victim girl that she had gone with the appellant and had stayed with him at various places and had also enjoyed sex with the appellant, the appellant can be linked with the crime of offence punishable under Section 366 of the Indian Penal Code at least. According to Shri Vaibhav Sheth, learned

counsel appearing for the appellant, this inference drawn by the learned trial Judge is nothing but a conjecture or surmise because the prosecution was under obligation to prove the elements of either threat or enticement and so also the word “taking” used in Section 361 of the Indian Penal Code. Section 361 of the Indian Penal Code defines 'kidnapping' which is made punishable under Section 363 of the Indian Penal Code. The learned trial Judge has ignored various aspects including the infirmities which are apparent in the deposition of the victim girl. This witness on plain reading of the judgment is found to be a self-condemned witness and when she herself has said that she had left her village alone and at that time the appellant was not with her, the appellant ought not to have been linked with the crime punishable under Section 363 of the Indian Penal Code. It is in evidence that on the date of incident, the victim girl was aged 16 years 11 months and 13 days. Meaning thereby, she was of about 17 years of age. It is also in evidence that prior to her leaving her parental home and the

village in which she was residing, her marriage was performed with one Mayabhai, whose name has been referred to in the FIR given by the father of the victim girl. The crucial question is not whether the victim could have been said under the guardianship of the complainant or any of the parents or not. Though the word “engagement” has been used, which is popularly known as “Sagai” in Gujarati vernacular language, but the evidence shows that the victim girl was the wife of said Mayabhai and this Mayabhai has neither filed any complaint nor has been examined as prosecution witness. It is in evidence that before the marriage with Mayabhai, the victim girl had some liking for the appellant and both of them were meeting each other at certain places and so a swatch was also kept on the movement of the victim girl by her parents. All these things are part of record. So in this situation, keeping in mind the ratio of the decision in the case of ***S. Varadarajan v. State of Madras, reported in AIR 1965 SC 942***, the learned trial Judge ought

to have given benefit of doubt to the appellant.

4. It is rightly argued by Shri Vaibhav Sheth, learned counsel appearing for the appellant, that when the learned trial Judge had acquitted the appellant from the charge of offence punishable under Section 366 of the Indian Penal Code, he could not have linked the appellant with the charge of offence punishable under Section 363 of the Indian Penal Code, especially when the victim girl had deposed before the Court on oath that she had left the village on her own. She had married with the said Mayabhai prior to the date of incident, and she had moved voluntarily at various places including Ranavav, Rajkot and Vadodara. Not only that, some of the persons in village were also aware about the movement of appellant and the victim girl, and therefore only, when both the appellant and victim girl were at Vadodara, a message was sent to them, as two persons had been to Vadodara and they were informed that both of them now shall have to appear before

the Police because of filing of the complaint in question. Meaning thereby, they have voluntarily returned to their native village on receipt of the said message and thereafter, the statement of the victim girl was recorded and she was sent for medical examination.

5. Considering various admissions made by the victim girl, the appellant has been acquitted from the charge of offence punishable under Sections 366 and 376 of the Indian Penal Code. It ought to have been brought on record by the prosecution by cogent and convincing evidence that the active participation of the victim girl in all the activities of the appellant was the result of the enticement or threat by the appellant. Here the evidence is not only lacking but the learned trial Judge has observed that the evidence of material witnesses examined by the prosecution, including the parent i.e. complainant, evidence of mother and grandmother of the victim girl, cannot be equated with the evidence of preliminary evidence. On the contrary, the said observation says that the

evidence of these three witnesses are of hearsay nature. So such evidence even cannot be read legally as a piece of evidence in the eye of law. Shri Vaibhav Sheth has placed reliance on one decision in the case of ***Shyam and another v. State of Maharashtra, reported in AIR 1995 SC 2169***, and it is submitted that the observations made by the Apex Court in the cited decision, mainly in paragraph no.3, would squarely be applicable to the present case and the appellant, therefore, may be acquitted from the charge for which he has been held guilty.

6. According to Shri P.D. Bhate, learned Additional Public Prosecutor, the finding of guilt recorded mainly on the ground that there is evidence to show that the victim girl was a minor girl and she was below 18 years of age and she was under lawful guardianship of her parents and as she had not gone to her in-laws after marriage and when the victim girl has said that she had accompanied the appellant at various places and had stayed with him, then it was possible for the learned trial Judge to

infer that unless the victim girl was either enticed or threatened, she might not have left the village. The leaving of village by the minor victim girl itself is “taking” within the meaning of Section 361 of the Indian Penal Code. In response to the query raised by the Court, Shri P.D. Bhate, learned Additional Public Prosecutor, has fairly accepted that the ratio of the decision in the case of Shyam (supra) probably clinches the issue before this Court.

7. According to me, the version of PW-10 victim girl has not been appreciated correctly by the learned trial Judge. There are material contradictions and certain admissions which are sufficient to observe that the prosecution has not proved the element of “taking” which is required to be proved by the prosecution. The victim girl has admitted that she had developed relations with the appellant prior to her marriage. She was bold enough to leave the village and enjoy life with the appellant at various places, including Rajkot, Vadodara, etc. as a matured girl. She was a fully grown

up girl of 17 years of age. It is difficult for this Court to say that she might not have understood the conduct of the appellant and ultimately the intention at the time when she was moving with the appellant. It would not be perhaps proper for this Court to say that it was a determined trip of the victim girl with the appellant, otherwise being a married girl she would not left the village and the parental home at all. Her marriage appears to be a marriage against her wish and will. All these aspects have not been considered properly by the learned trial Judge. The basic principle of appreciation of evidence of witnesses in a criminal trial is found ignored. It would be beneficial to reproduce the relevant paragraph no.3 of the cited decision in the case of Shyam (supra), which according to Shri P.D. Bhate even clinches the issue, is as under :

> *"3. In her statement in court, the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning*

*when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called "taking", it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/ accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She*

*could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused-Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle an, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam-the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the appellants/accused under Section 366, I.P.C., would thus fail. Accordingly, the appellants deserve acquittal. The appeal is, therefore, allowed acquitting the appellants."*

8. Of course, the decision in the case of S.Varadarajan (supra) is not referred to or mentioned in the said decision in the case of Shyam (supra), but the shadow of ratio of the decision in the case of S.Varadarajan (supra) is apparent on the reasons assigned by the Apex Court while acquitting the accused of the cited decision, reversing the order of conviction recorded by the Bombay High Court.

9. The case of the appellant is on a better footing than the case of Shyam (supra) because in the case before the Bombay High Court (Shyam), the victim girl had deposed that she was threatened right from the beginning at the time when she was being kidnapped. In the present case, the victim girl has not said that she was either threatened or enticed. On the contrary, her version is that when she left the village, the appellant was not with her. It is very likely that the appellant might have joined her subsequently at a suggested place. In that situation, the prosecution ought to have produced such evidence that it is the appellant who is

responsible for enticing the victim girl to leave the village and to see him at a particular place. In absence of such evidence, it would not be either proper, legal or justified to say that the conviction recorded by the learned trial Judge is legal and proper and, therefore, the same is required to be confirmed. On the contrary, the Court is of the view that the finding recorded by the learned trial Judge holding the appellant guilty is erroneous and when he was acquitted from the charge of offence punishable under Sections 366 and 376 of the Indian Penal Code, he also could have been given benefit of doubt and could have been acquitted also from the charge of offence punishable under Section 363 of the Indian Penal Code. The decision in the case of Shyam (supra) and the observations made by the Apex Court in the case of S.Varadarajan (supra) would help the present appellant. So the aforesaid totality of facts and circumstances of case takes me to a conclusion that the judgment and order of conviction and sentence is required to be reversed by giving the appellant benefit of

doubt.

10. In view of aforesaid observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 15th March 2007 passed by the learned Presiding Officer, Fast Track Court, Porbandar, in Sessions Case No.10 of 2003 is hereby quashed and set aside. The appellant is hereby ordered to be acquitted from the charge levelled against him in respect of the offence in question by giving him benefit of doubt. The amount of fine, if any paid by the appellant, be refunded to the appellant on his proper identification.

11. Before parting with the order, it is relevant to note that the appellant was asked to undergo rigorous imprisonment for three years. He was on bail pending trial but ultimately this Court had not granted bail to the appellant and it was decided that the appeal of the present appellant shall be heard in the month of April 2007. So it was submitted by Shri Vaibhav Sheth that either this Court may undertake the hearing of the appeal or may pass appropriate orders as to the bail.

Therefore, the hearing of the appeal is undertaken as the papers were ready and Shri P.D. Bhate, learned Additional Public Prosecutor, had shown his willingness to argue the appeal on merits.

Direct Service is permitted.

***(C.K. Buch, J)***

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